

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

METROPOLITAN INTERPRETERS
AND TRANSLATORS, INC.

and

Case 21-CA-38356

COMMUNICATIONS WORKERS OF
AMERICA, LOCAL 9400, AFL-CIO

Stephanie Cahn, Atty., Counsel for the General Counsel,
Region 21, Los Angeles, California.
Robert Zaletel and Robert Millman, Attys., Counsel for Respondent,
Littler Mendelson, at, respectively,
San Francisco and Los Angeles, California.
Marco Ramirez, Union Organizer; Jeff Finley, Union Director, for
Charging Party, Paramount, California.

DECISION

Statement of the Case

Lana H. Parke, Administrative Law Judge. This matter was tried in Los Angeles, California on November 17 through 19, 2008¹ upon Complaint and Notice of Hearing (the Complaint) issued August 8, 2008 by the Regional Director of Region 21 of the National Labor Relations Board (the Board) based upon charges filed by Communications Workers of America, Local 9400, AFL-CIO (the Union or the Charging Party). The Complaint alleges Metropolitan Interpreters and Translators, Inc. (the Respondent) violated Sections 8(a)(1) and (3) of the National Labor Relations Act (the Act).² The Respondent essentially denied all allegations of unlawful conduct.

Issues

1. At all relevant times, was the alleged discriminatee a supervisor of the Respondent within the meaning of Section 2(11) of the Act?
2. Did Respondent violate Section 8(a)(1) of the Act on April 25 by requiring the alleged discriminatee to follow instructions contained in a document entitled "What Supervisors May [and May Not] Say and Do"?

¹ All dates herein are 2008 unless otherwise specified.

² At the hearing, the General Counsel amended the remedy provisions of the complaint to include a notice-mailing request.

3. Did Respondent violate Section 8(a)(3) and (1) of the Act on May 8 by suspending the alleged discriminatee?

On the entire record³, including my observation of the demeanor of witnesses and after considering the briefs filed by the General Counsel and the Respondent, I make the following⁴

Findings of Fact

I. Jurisdiction

Respondent, a New York corporation, with principal offices in New York City, New York, and operations at United States Drug Enforcement Administration contract facilities located in several counties in California and Nevada, including Los Angeles County, California, has been engaged in the business of providing law enforcement translation services to the United States Drug Enforcement Administration and other law enforcement agencies. During the 12-month period ending April 11, a representative period, Respondent, in conducting its business operations described above in paragraph 2(a), provided services valued in excess of \$50,000 directly to the United States Government. I find Respondent has at all relevant times been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act. Respondent admits, and I find, the Union has at all relevant times been a labor organization within the meaning of Section 2(5) of the Act.⁵

II. Supervisory Status of the alleged discriminatee

A. Respondent's Operations

The Respondent provides linguist services to the United States Drug Enforcement Administration (DEA) in Los Angeles, California pursuant to the DEA's wiretapping authorization under the provisions of Title III of the Omnibus Crime Control and Safe Streets Act of 1968 (18 U.S.C.S. §§ 2510-2520). Linguist services encompass the monitoring, translating, summarizing, and transcribing of DEA wiretaps by linguists, who are interchangeably referred to as monitors, translators, and transcribers.⁶ The Respondent operates linguist facilities for DEA wiretaps at eleven Los Angeles sites, employing 300-400 linguists among the eleven locations. One senior site supervisor coordinates the Respondent's operations at all eleven Los Angeles sites, and seven site supervisors directly supervise the eleven locations with one site supervisor assigned to each location.⁷ Site supervisors in turn oversee shift supervisors whom the Respondent employs at each of its DEA linguist facilities and who directly oversee the linguists'

³ Post hearing, the Respondent moved to augment the record with the November 20, 2008 Decision of the California Unemployment Insurance Appeals Board, Case No 2455157, denying the alleged discriminatee's unemployment benefits, as well as transcript portions of the alleged discriminatee's testimony given in those proceedings on October 16, 2008, both of which motions the General Counsel opposed. The Respondent's motions are denied.

⁴ For security reasons, all names of witnesses and of Respondent's supervisors and employees have been redacted.

⁵ Unless otherwise explained, findings of fact herein are based on party admissions, stipulations, and uncontroverted testimony.

⁶ Transcribing involves producing a verbatim written account of what the wiretap target said in a foreign language with an accompanying English translation.

⁷ The site supervisor position is, by stipulation, supervisory within the meaning of Section 2(11) of the Act

work at each site. All shift supervisors regardless of location have the same employer-established authority, job duties, and responsibilities.⁸ In written form the shift supervisors' duties include:

- 5 Maintaining and confirming linguist attendance during a shift.
- Ensuring that wiretap investigations are properly staffed at all times.
- Assigning linguists to monitoring, transcribing, translating duties.
- Assigning linguists for Quality Control (QC) duties
- Ensuring that DEA and/or task force agents receive accurate information from monitors
- 10 at all times, especially during high wiretap activity.
- Document any incidents that took place during the shift.
- Record QC findings and submit them to Site Supervisor for review.
- Conduct one-on-one meeting with the linguist who produced the work in order to discuss
- QC findings.

15 The relevant linguist worksite herein is known as "Division" or "the Roybal Building." At all relevant times, Division's customary workload consisted of about 12 active DEA wiretap cases. A team of linguists monitored each case, overseeing one to 15 telephone lines with an average of about six. At Division the Respondent operated two shifts, each with approximately

20 20-25 linguists whose work was overseen by two shift supervisors per shift.

In late 2003, the Respondent promoted the alleged discriminatee from a linguist position to shift supervisor. Beginning in 2006 and continuing through the relevant period, the alleged discriminatee served as a shift supervisor at Division where she reported to Supervisor A,

25 Division Site Supervisor, who in turn reported to Supervisor B, Senior Site Supervisor. The alleged discriminatee worked weekends and some Mondays and Fridays in order to accommodate her school schedule. As a shift supervisor during the relevant period, the alleged discriminatee performed linguist duties the majority of her work time in addition to overseeing the work of other linguists at Division.

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B. Shift Supervisor Duties

1. Scheduling and Assigning Employees

35 Upon DEA notification of scheduled wiretaps during the relevant period, the Los Angeles area senior site supervisor determined the location where monitoring would take place and notified the appropriate site supervisor, who assigned linguists to the wiretap. For wiretaps assigned to Division, site Supervisor A weekly prepared Division's linguist work schedules, which were then given to the appropriate shift supervisors, including the alleged discriminatee ,

40 to contact each named linguist to confirm the scheduling. If a scheduled linguist was unable to cover an assignment, the alleged discriminatee said she noted the circumstances on the work schedule and notified the site supervisor who decided what to do. According to the alleged discriminatee, sometimes linguists swapped shifts or got another linguist to cover a shift and told the alleged discriminatee of the arrangements, which she noted on the work schedule.

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⁸ The alleged discriminatee testified essentially that notwithstanding the supervisory authority exercised by other shift supervisors, her authority was limited and constrained. Site Supervisors A, B, and C credibly testified otherwise, and the General Counsel has provided no contradictory evidence except the alleged discriminatee's testimony. As detailed below, I have

50 not found the alleged discriminatee to be a credible witness. Accordingly, I find the Respondent vested all shift supervisors with the same authority.

Supervisor A's testimony of scheduling responsibilities differed from the alleged discriminatee's account. Supervisor A said the alleged discriminatee could, without prior approval: change employees' schedules if she encountered scheduling problems when confirming linguist availability, use the employee telephone list to find a replacement If a scheduled linguist were
 5 unable to report to work, and assign either herself or another linguist to an unmonitored wiretap line if a scheduled linguist reported late to work.

An incident report filed by LA Clear site supervisor, Supervisor C in 2006 relates to the alleged discriminatee's scheduling of employees and reads in pertinent part.⁹

10 [Incident] Report date: June 29, 2006

I asked [the alleged discriminatee] if [Employee A] had called in. [The alleged discriminatee] said that [Employee A] had changed her day to Friday. I told [the alleged discriminatee] that when the change had been done, it left 2 people on Thursday and 4
 15 on Friday. I also reminded [the alleged discriminatee] that I had asked to be notified of any changes in the schedule.¹⁰

The following year, while employed as a shift supervisor at Division, the alleged discriminatee sent an email to Supervisor A dated June 18, 2007, stating in pertinent part, "[Employee B] requested some changes on his schedule.... Everything was properly worked to cover the monitoring needs and [Employee B's] request."

The alleged discriminatee testified that site supervisors were responsible for linguist work assignments, a task in which she became involved only if site supervisors were busy. She explained that when the DEA informed the Respondent that it needed a wiretap, Supervisor B
 25 notified the appropriate site supervisor, and

[If] the site supervisor he or she is very busy[,] [h]e would say, hey, x agent is going to open a line. He is going to need a monitor. [Supervisor B] wants you to work the skills for these given monitors, but it has to be [Supervisor B] the one who determines what monitors are going to go to that office or to work on what case. Filling the slots of the skills will be just a clerical task to relieve the work of [the site supervisor].¹¹

The alleged discriminatee also testified she could assign or "delegate" transcription work to linguists and informally request linguists to assist in monitoring unassigned telephone lines but compliance with her request would be the linguists' call.¹² In contrast, Supervisor A testified

⁹ During 2006, the alleged discriminatee served as a shift supervisor at the LA Clear site, where she reported to Supervisor C.

¹⁰ Counsel for the General Counsel argues this report evidences the alleged discriminatee's obligation to check with management before altering employees' schedules. I find the more reasonable inference is that rather than curbing the alleged discriminatee's authority over employees' schedules, management required the alleged discriminatee to report any changes she intended to make in order to permit management to correlate employee schedules efficiently.

¹¹ It is reasonable to infer from the alleged discriminatee's testimony in this regard that assignment of linguists to specific wiretaps involved assessment of their skills.

¹² The alleged discriminatee said linguists could delegate transcription work to other employees. Her example—two linguists assigned to the same wiretap agreeing how to divide attendant duties—does not show assignment or delegation. Without corroboration, I cannot

Continued

that in response to changing wiretap activity, the alleged discriminatee could, without prior approval, move linguists from one case to another and assign linguists to help other linguists. Supervisor A described an instance where the alleged discriminatee independently assigned linguist, Employee C, to complete a transcript, which he failed to do. Supervisor A met with the
 5 alleged discriminatee and Employee C and told Employee C that the alleged discriminatee was the supervisor and he needed to do what she told him.

According to Supervisor A, shift supervisors including the alleged discriminatee had authority to and did move linguists from one line to another and assign transcription when case
 10 activity was slow. On June 29, 2006, the alleged discriminatee informed Supervisor B that she had given the linguists under her a little time off because they had been so busy the week before and that she was letting them work on Spanish grammar. Supervisor B told the alleged discriminatee that employees could work on grammar skills for a 30-minute period during the shift, but the alleged discriminatee needed to see that the linguists also produced work, namely
 15 transcripts.¹³ Supervisor B "instructed [the alleged discriminatee] to also assign the work and review the work with the monitors by providing [Supervisor B] with an evaluation and the monitors with feedback/exercises."

During the relevant period, shift supervisor, Supervisor D, at the Long Beach facility
 20 regularly and independently assigned such work as transcription or call charting and reassigned employees from one line to another as workflow dictated, as did Supervisor E who had worked as the Respondent's shift supervisor at various linguist locations since 2006.

2. Responsibly Directing Employees

The alleged discriminatee asserted that the linguists whose work she oversaw during her assigned shifts performed their duties essentially without direction and that she had no authority to evaluate their work. According to Supervisor A, shift supervisors were responsible for
 25 assuring quality in the linguists' work, and the alleged discriminatee reviewed line sheets or transcripts and met with linguists to discuss necessary improvements but did not otherwise evaluate the linguists' work. Without specifying in what manner, Supervisor A testified the Respondent held shift supervisors, including the alleged discriminatee, responsible for the
 30 monitors' work.

3. Recommending Transfers and Layoffs

When a wiretap case ended or when its telephone activity decreased, the Respondent "reduced" the linguists assigned to that case. The Respondent considered reduced employees to be laid off, and their subsequent return, even if only after a brief period, was termed a recall.
 40 Two incident report filed by Supervisor C on the following dates relate to the alleged discriminatee's involvement in employee layoffs and read in pertinent part

[Incident] Report date: June 19, 2006

I spoke with [the alleged discriminatee]...and asked if she had *sent* Employee D home
 45 on Sunday. [The alleged discriminatee] said that she had *offered* for Employee D to go

accept her inherently improbable testimony that rank and file employees could assign work to each other.

¹³ It appears from an incident report Supervisor B submitted concerning this conversation
 50 that the company policy was to give linguists transcription assignments during slow periods, but implementation was left to the shift supervisor.

home [when there was a technical problem with the lines]...I explained to [the alleged discriminatee] that she should inform me if a situation like this ever happened again because I may be able to place those monitors on other cases.

5 [Incident] Report date: June 30, 2006

I informed [the alleged discriminatee] that [the XYZ] case was reducing manpower from three to two monitors. I told her to work on the schedule and to notify me of the changes as soon as possible...[Supervisor A] said that [the alleged discriminatee] had called her and updated her of the changes.

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Other shift supervisors recommended transfers and layoffs. On occasions during the relevant period, Supervisor D determined work was slow and suggested to the site supervisor that a specific employee be transferred to another location, which suggestions were approved. In 2008 when wiretap activity on two cases decreased, Supervisor D recommended the two employees with least experience on each of the cases be reduced. During that same period, Supervisor D recommended transfers of linguists to his location. Supervisor E also recommended the transfers of several employees, one of which, in March 2007, was pursuant to the linguist's unsatisfactory performance. Although it was company practice to first reduce the last linguist assigned to a case, shift supervisors could take into account skills and language abilities in departing from the practice. The Respondent routinely followed recommendations from shift supervisors regarding reductions or transfers.¹⁴

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4. Authority to Discipline

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The alleged discriminatee testified she had no authority to discipline employees. The Respondent directed shift supervisors to document all incidents with employees, including "incidents where a supervisor talks to an employee about his/her poor work performance."¹⁵ When necessary, the alleged discriminatee filled out incident reports that were filed in employee personnel files. Supervisor A also testified that she told the alleged discriminatee she could suspend any employee who was being disrespectful, as she did not have to put up with the linguists.¹⁶

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During the relevant period, Supervisor E suspended two employees for, respectively, rude and disruptive behavior without prior consultation with management. A month or two before the hearing, at the Long Beach facility, Supervisor D, investigated the circumstances of

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¹⁴ On one occasion, the alleged discriminatee suggested linguist Employee E to Supervisor A for a large transcription project because she knew Employee E's work was quick and good, and Employee E was assigned to the project. The alleged discriminatee denied she had recommended Employee E, saying she had merely informally given Supervisor A her opinion that the employee would fit Supervisor A's needs. The testimony regarding this incident is too inconclusive to permit a finding that the alleged discriminatee recommended a transfer for Employee E.

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¹⁵ Supervisor A issued the latest such reminder to shift supervisors by memo dated October 30, 2007, which also mentioned a plan for shift supervisors to nominate linguists to receive good teamwork recognition and reminded shift supervisors to ensure linguists were caught up with calls and followed required format.

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¹⁶ It is clear that by the term "suspend" in this context, the Respondent contemplated an informal ad hoc disciplinary action, in which a shift supervisor sent an employee home for the remainder of a particular work period with any follow-up discipline to be administered by a site supervisor.

an employee striking another shift supervisor, sent the employee home, and provided an incident report to management.¹⁷ Thereafter, Supervisor D recommended the termination of the employee, which recommendation was followed.¹⁸ Supervisor D provided incident reports in other situations to management, which reports were placed in employee personnel files.

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C. Credibility

I cannot find the alleged discriminatee's testimony to be fully credible. She was occasionally resistant to cross examination, and her answers were often equivocal and self-serving. For example, during cross examination by Mr. Zaletel, the alleged discriminatee initially agreed that when she worked in Division as a shift supervisor, changes in employees' schedules had to be approved by her or another shift supervisor. Following an objection by Counsel for the General Counsel, the alleged discriminatee asked Mr. Zaletel to be "clear" in his question, prompting the following exchange:

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Q by Mr. Zaletel: Any changes at Division that would be made in the schedule would have to be done with the approval of either you or another shift supervisor, is that correct?

A I have here a problem. Maybe we have not been thorough about the situation.

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Q Okay.

...

A: I don't know how to answer.

...

Mr. Zaletel: I'll rephrase [the question]...You would have to -- either you or another shift supervisor had to approve any changes to the schedule at Division, is that right?

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A I think that is not correct. But, if you try to explain me what you want me to answer you...because I really don't understand what you are saying, sir.

I found the alleged discriminatee's manner and demeanor in this and in other instances to reflect wariness and evasiveness rather than confusion or perplexity. Other of the alleged discriminatee's testimony was too implausible to be credited, as with her insistence that the Respondent had never informed her of any of her duties as a shift supervisor. Finally, some of the alleged discriminatee's testimony conflicted with documentary evidence: the alleged discriminatee insisted she had no authority to schedule employees, but, as noted above, incident reports issued in June 2006 and a 2007 email revealed the alleged discriminatee had independently modified employees' schedules, the only caveat to which was the requirement that she notify the site supervisor of the changes. In light of these considerations, where the alleged discriminatee's testimony conflicts with that of other witnesses, I decline to accept it.

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¹⁷ After striking the shift supervisor, the employee left the facility. The shift supervisor who had been struck contacted Supervisor D, who in turn contacted the site supervisor, telling him he would investigate the matter and report back. Thereafter, Supervisor D telephoned and met with the employee.

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¹⁸ Supervisor D's recommendation came after a government agent requested the employee not be allowed into the Long Beach facility. When Supervisor D relayed that information to the site supervisor, Supervisor D recommended that the employee should not be involved with the company or the case.

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III. Alleged Violations of Sections 8(a)(1) and (3) of the Act

In 2006, the Union commenced an organizational drive among the Respondent's linguists. During the course of the Union's campaign, the alleged discriminatee attended Union meetings, completed the Union's in-house training program, talked to coworkers about the Union, and participated in authorization card solicitation. On April 2, the Union filed a representation petition with the Board.

On April 25, Supervisor A, met with the alleged discriminatee and another shift supervisor and reviewed with them written instructions, "What Supervisors May Say and Do" (Do's and Don'ts), which the shift supervisors were to follow during the union campaign. Supervisor A invited the shift supervisors to return to positions as linguists if they wished to support the Union.

Between May 2 and May 16, the Board conducted a mail ballot election for all full-time and regular part-time translators and interpreters employed by the Employer under its DEA contracts for DEA facilities located in the Counties of Los Angeles, Orange, Ventura and Riverside, California, and Washoe and Clark Counties, Nevada. During the balloting, the alleged discriminatee telephoned about 50 linguists to encourage them to complete and return their ballots, utilizing telephone numbers coworkers had voluntarily given her as well as employee numbers provided by the Union. A few of the contacted linguists reported the alleged discriminatee's telephone calls to the Respondent. Respondent's vice president decided to suspend the alleged discriminatee because of her blatant insubordination in disregarding the Do's and Don'ts guidelines and because the Respondent believed the alleged discriminatee had misappropriated employee telephone numbers in making the calls.¹⁹

On May 8, Supervisor B called the alleged discriminatee into her office and, in the presence of Supervisor A, informed the alleged discriminatee that because many linguists, whom Supervisor B declined to name, had complained that the alleged discriminatee had harassed them about the Union, the Respondent was suspending the alleged discriminatee without pay.

IV. Discussion

A. Legal Principles

It is undisputed that the Respondent, on April 25, required the alleged discriminatee to follow its union-campaign Do's and Don'ts for supervisors, which restricted union activity, and, on May 8, suspended her for pro-union activities during the Union's organizational drive among the Respondent's employees. In determining whether the Respondent thereby violated

¹⁹ The Respondent asserts the telephone numbers the alleged discriminatee used were misappropriated from confidential company records to which the alleged discriminatee had access. No probative evidence supported the accusation, and no evidence contradicted the testimony of union representative, Witness A, that the telephone numbers the Union provided to the alleged discriminatee were obtained from prounion employees who submitted telephone numbers of coworker friends and acquaintances to the Union. There is no evidence that the alleged discriminatee engaged in misconduct.

Sections 8(a)(1) and (3) of the Act, the threshold issue is whether the alleged discriminatee was a supervisor within the meaning of the Act.²⁰ Section 2(11) of the Act defines a supervisor as:

Any individual having the authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall, promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

The party alleging supervisor status must prove not only possession of at least one of the supervisory authorities enumerated in Section 2(11), but also that the putative supervisor uses independent judgment in the exercise of that authority. *Oakwood Healthcare, Inc.*, 348 NLRB 686, 687 (2006). To prove independent judgment, the alleging party must show that when the putative supervisor exercises authority, the decision to do so is “free of the control of others” and “not . . . dictated or controlled by detailed instructions” including “the verbal instructions of a higher authority.” *Id.* at 693.

Section 2(11) requires only possession of authority to carry out an enumerated supervisory function, not its actual exercise. Nevertheless, “the evidence still must suffice to show that such authority actually exists and that its exercise requires the use of independent judgment.” *Barstow Community Hospital*, 352 NLRB No. 125, slip op. 2 (2008) and cases cited therein.²¹ The fact that most of an alleged supervisor’s work duties involve the performance of routine tasks and responsibilities “does not preclude the possibility that such regular assignments require the exercise of independent judgment.” *Loyalhanna Care Center*, 352 NLRB No. 105 fn 4 (2008). Further, the mere existence of employer guidelines and policies “is not necessarily incompatible with the existence of independent judgment. If there is room for discretionary choices by the putative supervisor, and if the degree of discretion exercised rises to the requisite level, a finding of independent judgment is warranted.” *Barstow Community Hospital* at slip op. 2, citing *Oakwood Healthcare*, *supra* at 693.

B. Scheduling and Assigning Employees

The Board interprets the term “assign” as referring to “the act of designating an employee to a place (such as a location, department, or wing), appointing an employee to a time (such as a shift or overtime period), or giving significant overall duties, i.e., tasks, to an employee.” *Oakwood Healthcare*, 348 NLRB 686, 689 (2006). The Respondent argues that the alleged discriminatee possessed and exercised the authority to schedule and to assign work to employees.

²⁰ Section 2(3) of the Act excludes any individual employed as a supervisor from the definition of “employee.” While Section 8(a)(3), unlike Section 8(a)(1), does not expressly limit its antidiscrimination protection to individuals who are employees within the meaning of Section 2(3), Court precedent establishes that Section 8(a)(3) bars job discrimination only against individuals who meet the statutory definition of “employee.” See *NLRB v. Town & Country Electric, Inc.*, 516 U.S. 85, 88 (1995).

²¹ “[T]he Board . . . exercise[s] caution ‘not to construe supervisory status too broadly because the employee who is deemed a supervisor is denied rights which the Act is intended to protect.’” *Oakwood Healthcare, Inc.*, *supra* (quoting *Chevron Shipping Co.*, 317 NLRB at 380–381).

Along with other shift supervisors, the alleged discriminatee was responsible for adjusting linguists' work schedules and for assigning linguists to the duties of monitoring, transcribing, and translating, moving them among cases and assignments as case activity demanded. The record establishes that the tasks of monitoring, translating, and transcribing wiretaps entailed the exercise of skilled proficiencies, i.e. ability to comprehend at least two languages, ability to translate from one language to another, and ability to transcribe telephone conversations along with their translations. The exercise of those skills had critical consequences to important criminal investigations and thereby constituted significant duties.

Finding the alleged discriminatee, along with other shift supervisors, had the authority to assign significant overall duties to the linguists, is only half the analysis. For supervisory status, the Board requires that such assignments be made by exercising independent judgment. "[T]o exercise 'independent judgment' an individual must at a minimum act, or effectively recommend action, free of the control of others and form an opinion or evaluation by discerning and comparing data." *Oakwood Healthcare*, supra, at 693. In addition, "[t]he authority to effect an assignment...must be independent, it must involve a judgment, and the judgment must involve a degree of discretion that rises above the 'routine or clerical.'" Id. (citations omitted).

If the alleged discriminatee's reassignment of linguists from one wiretap line to another or from one work duty to another involved only the "mere equalization of workloads," it would not require the exercise of independent judgment. *Oakwood Healthcare*, supra, at 693–694, 697. However, the evidence establishes that in assigning or "delegat[ing]" work to linguists, the alleged discriminatee considered linguists' skills, testifying essentially that in making assignments she had to "work the skills" of the linguists.²² Although the alleged discriminatee insisted that "[f]illing the slots of the skills [was] just a clerical task to relieve the work of [the site supervisor]," no evidence supports her assertion, and I find the extent and complexity of the linguists' duties the alleged discriminatee assigned necessarily involved assessment of individual skills and required judgments that were greater than routine. In making assignments, the alleged discriminatee was free of all but general managerial control and could only have evaluated linguist competency by discerning and comparing linguists' abilities. The alleged discriminatee therefore exercised independent judgment of employee skills in making work assignments. See *RCC Fabricators, Inc.*, 352 NLRB No. 88 (2008). Accordingly, I find the alleged discriminatee possessed and exercised supervisory authority to assign linguists to significant duties and responsibilities as normal or exigent wiretap case flow required. In doing so, she considered the relative skills and experience of available employees. Accordingly, at all times relevant hereto, the alleged discriminatee had the authority, in the interest of the Respondent, to "assign" employees, using independent judgment in doing so.

C. Responsibly Directing Employees

The Respondent argues that the alleged discriminatee possessed authority to responsibly direct employees. The authority "responsibly to direct" exists when an individual decides "what job shall be undertaken next or who shall do it, . . . provided the direction is both 'responsible' . . . and carried out with independent judgment." *Oakwood Healthcare, Inc.*, 348 NLRB 686, 691 (2006). "[F]or direction to be 'responsible,' the person performing the oversight must be accountable for the performance of the task...such that some adverse consequence

²² Although the alleged discriminatee's testimony in this regard related to those assertedly rare times when she assisted a "very busy" site supervisor in making initial assignments, it is reasonable to infer that wiretap reassignments and delegations, which the alleged discriminatee regularly made, also required linguist skill assessment.

may befall the one providing the oversight if the tasks performed are not performed properly.” Id., at 692. “Thus, to establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.” Id., at 692.

While the alleged discriminatee directed the linguists’ work, the Respondent has failed to present specific evidence of “actual accountability” to prove responsible direction by the alleged discriminatee. See *Golden Crest Healthcare Center*, 348 NLRB 727, 731 (2006). Although Supervisor B in 2006 reprimanded the alleged discriminatee for letting linguists study grammar instead of doing transcriptions and although Supervisor C filed three incident reports in 2006 about the alleged discriminatee’s failure to notify management of schedule changes she had made, there is no evidence that the alleged discriminatee would be held to answer or suffer adverse consequences for deficient or improper linguist performance. Because the Respondent failed to present any evidence of actual accountability, it did not show the alleged discriminatee possessed the authority responsibly to direct the linguists and has not satisfied its burden of proof in that regard. See *Astyle Apparel*, 351 NLRB 1287 (2007); *Lynwood Manor*, 350 NLRB 489 (2007).²³

D. Recommending Transfers and Layoffs

Although shift supervisors were expected to inform management when they reduced (laid off) linguists, the evidence shows the shift supervisors could make reduction selections without consulting anyone, as the alleged discriminatee did in the 2006 XYZ case reduction. The Respondent routinely followed the recommendations of Supervisor D and Supervisor E that employees be reduced or transferred to other locations for either workflow or disciplinary reasons. As shift supervisors could independently select linguists for reduction and as shift supervisors’ recommendations regarding employee transfers were routinely followed, the recommendations were effective, as contemplated in Section 2(11) of the Act. Having found that the alleged discriminatee possessed the same authority as other shift supervisors, I find that at all times relevant hereto, she had the authority to and exercised independent judgment in effecting or effectively recommending the transfer or lay off of employees.

E. Authority to Discipline

Shift supervisors were instructed to provide written incident reports regarding employee conduct or workplace events. While the reports could document employee dereliction of duty or insubordination, there is no evidence the incident reports contained any recommendations for discipline. Although the reports were placed in employees’ personnel files, there is also no evidence the Respondent utilized the reports for follow-up discipline or reward or that the reports laid a foundation for any future employee action. See *Los Angeles Water & Power Employees’ Assn.*, 340 NLRB 1232, 1234 (2003) (individual’s report of misconduct does not constitute effective recommendation of discipline where management undertakes its own investigation and decides what, if any, discipline to impose); *Vencor Hospital—Los Angeles*, 328 NLRB 1136 (1999); *Ryder Truck Rental, Inc.*, 326 NLRB 1386 (1998) (authority to issue verbal or written warnings that do not affect employee status or to recommend discipline do not evidence disciplinary authority); *Millard Refrigerated Services*, 326 NLRB 1437, 1438 (1998) (employees did not effectively recommend discipline when they submitted disciplinary forms to the plant

²³ Since the Respondent has not shown actual accountability, I need not address whether the alleged discriminatee’s direction of linguists was exercised with independent judgment.

superintendent who approved them only after conducting an independent investigation; the employees exercised nothing more than a reportorial function that was typical of a "leadman" position); cf *Oak Park Nursing Care Center*, 351 NLRB 27 (2007). Shift supervisors' obligation to submit incident reports does not, therefore, signify supervisory authority.

The shift supervisors' responsibility for employee discipline, however, extended beyond completion of incident reports. While the evidence does not show that the alleged discriminatee ever disciplined any employee, Supervisor A specifically told the alleged discriminatee she could suspend any employee who was disrespectful. The alleged discriminatee's failure to exercise her authority does not negate supervisory status because possession rather than exercise of supervisory authority determines supervisory status. *Westwood Health Care Center*, 330 NLRB 935, 938 (2000). Further, the evidence establishes that shift supervisors other than the alleged discriminatee suspended employees for misbehavior without prior consultation with management and, on one occasion, a shift supervisor effectively recommended the termination of an employee. Since the alleged discriminatee possessed the same authority as other shift supervisors, I conclude that the alleged discriminatee, along with other shift supervisors, possessed the power, using independent judgment, to impose discipline.

VI. Conclusion

Inasmuch as the alleged discriminatee possessed the authority, in the interest of the Respondent, to transfer, suspend/lay off, assign, or discipline other employees as enumerated in the criteria of Section 2(11), she was at all times relevant herein a supervisor with the meaning of Section 2(11) of the Act and not an employee within the meaning of Section 2(3) of the Act.

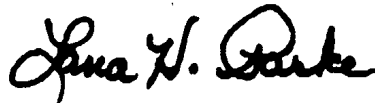
Having found the protections of Sections 8(a)(1) and (3) are not available to the alleged discriminatee (see *NLRB v. Town & Country Electric, Inc.*, supra), the complaint shall be dismissed in its entirety.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁴

ORDER

The complaint is dismissed.

Dated, March 5, 2009.



Lana H. Parke
Administrative Law Judge

²⁴ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.